

# LEGISLATIVE ALERT

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## *The Unconstitutionality of The Serious Fraud Office Bill*

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In almost all countries, the world over, it has been the experience of the various inhabitants that, for most of their problems, a trial and error approach with appropriate correction has been the significant hallmark that stamps them all as progressive and civilized societies. The stated idea behind the Serious Fraud Office Bill is the establishment of an investigative agency of Government. It is to be a specialized agency which will be vested with duties to monitor, investigate and on the authority of the Attorney General to prosecute what is compendiously classified as "suspected complex frauds and serious economic crimes".

The traditional role of maintaining law and order which is reposed in the Police Service by Article 200 of the Constitution admittedly encompasses these duties. The Attorney General also under Article 88 of the said Constitution is responsible for the prosecutions of all criminal offences. The dichotomy of complex frauds and serious economic crimes is unknown to our criminal justice system. Moreover, the Attorney General fulfils his Constitutional role under the criminal justice regime by having all offences prosecuted in the name of the Republic at his suit or any other person authorized by him in accordance with any law. To justify the duplication of the Constitutional duties of both the Police Service and the Attorney General by the establishment of a Serious Fraud Office, to perform functions already vested in these other bodies, necessitates the provision of data showing the weaknesses that have engendered failings in these institutions.

With the error and correction progressive attitude abandoned, a new institution like a Serious Fraud Office

stands the same chance of also developing similar faults as the old institution and a retrograde step is all that would result from the new creation. Furthermore, the Serious Fraud Office Bill contains provisions that demonstrate beyond all possible doubts, that it cannot survive a test of Constitutional propriety. It must therefore be rejected as unconstitutional!

The first noticeable unconstitutional feature of the Serious Fraud Office Bill is that under Clauses 1 and 2 it specifically sets out to create the said office with its integral divisions to "form part of the Public Services" of Ghana. It also, under Clauses 4, 5 and 6 makes provisions for the appointment of public officers to the office.

Now, the creation of a Public Service and the appointment of officers to such a service as are envisaged under the Bill have already been provided for in Articles 190 and 195 of the Constitution.

Under Article 190, it is mandatorily provided in effect that an Act of Parliament prescribing a public service "shall provide for the Governing Council for the Public Service to which it relates". The Bill has glaringly no provision for a Governing Council and so the Office and the clauses establishing it are ab initio unconstitutional. Besides, apart from the Inspector-General of Police (IGP) who is appointed by the President, acting in consultation with the Council of State, Article 195(1) provides that "subject to the provisions of the Constitution, the power to appoint persons to hold or to act in an office in the Public Services shall vest in the President acting in accordance with the advice of the Governing Council of the services concerned given in

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consultation with the Public Services Commission”.

In spite of this unambiguous Constitutional provision, the Executive Director is set to be appointed under Clause 4 of the Bill by the President “on the advice” of his own designated Minister given “in consultation with the Council of State”. The Deputy Executive Directors slated to head the various divisions of the office are to be appointed by the President under Clause 5 on the mere advice of the said Minister whom he had himself designated, with no advice or consultation from any other body or institution; the other persons or members of staff of the office are to be appointed or engaged by the President under Clause 6 in consultation with the Public Services Commission. It seems certain therefore that all appointments to the Serious Fraud Office contemplated under the Bill are intended to be made in clear violation of Article 195 of the Constitution; consequently Clauses 4, 5 and 6 of the Bill are unconstitutional provisions.

Clauses 3, 7, 8, 9, 10 and 11 define the functions of the Office and prescribe the powers and immunities of its office in such a manner as to leave no doubt whatsoever that a second police service is being created which will circumvent and undermine the provisions governing the manner in which the Police Service is operated and administered under the Constitution. Under the provisions of Article 202 of the Constitution the genuine Constitutional Police Service is headed by the IGP who is subject to the control and direction of the Police Council. Under the Bill, the purportedly contemplated statutory police service is to be headed by the Executive Director who will not be under the IGP and will not be subject to the control and direction of the Police Council, but will be under the President in defiance of Chapter fifteen, particularly Article 202, of the Constitution.

Moreover, against the fundamental right of Ghanaians enshrined in Article 14(5) of the Constitution by which “A person who is unlawfully arrested, restricted or detained by any person shall be entitled to compensation from that other person,” Clause 7(2) of the Bill is directed at insulating officers of the office from personal liability for wrongful acts committed against Ghanaians. It is therefore abundantly clear from an examination and analysis of the relevant provisions of the Constitution noted herein that Clauses 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Serious Fraud Office Bill are against the letter and spirit of the Constitution and must be castigated as unconstitutional.

What is worse, the Executive Director under Clause 11 acting on his own and without advice can authorise persons who are not police officers or even public officers to act for him in this novel Police office empowered to operate without police or public officers. This is a power which is not even enjoyed by the President under the Constitution in regard to the Police

Service. Furthermore one of the most oppressive provisions of the Serious Fraud Office Bill, is the penalty it imposes under Clause 13 on any person who fails without reasonable excuse to supply information or produce documents which the Director requires under Clause 9. The penalty on summary conviction is a fine not exceeding 5 million Cedis or imprisonment not exceeding 2 years or both.

The criminal sanction provided here, undermines by subtle implication the whole philosophy behind the accusatorial criminal justice system operating in Ghana. Indeed, it will be the only legislation in Ghana which is subversive of the principle which mandates that statements from witnesses and suspects must be voluntary to be admissible in evidence. It furthermore blatantly violates the fundamental human right and freedom guaranteed to Ghanaians under Article 19(10) of the Constitution. The Article provides that no person who is being tried for a criminal offence shall be compelled to give evidence at the trial. Surely if a person cannot be compelled to give evidence at his trial, then a fortiori, he cannot be compelled to give statement(s) before trial, to be used against him at his trial. The penalty provisions in Clause 13 are therefore in the circumstance unconstitutional.

The most pernicious and dangerous provision which will destroy the rule of law and create a police state reminiscent of the secret police in the communist and other non-democratic states is Clause 9. Under this clause, for instance, upon the mere statement devoid of proof that a man is suspected to be engaged in an offence involving allegedly serious financial or economic loss to the state, the Director will have power to direct the freezing of his assets and bank accounts. Moreover under the said Clause 9 a person is obliged to appear before the Director to answer questions; his liberty of movement can, therefore, be interfered with. Under the excuse of investigation he can be detained and his freedom of movement and other freedoms guaranteed under Article 14 and 21 of the Constitution will then be infringed.

Under the Constitution of Ghana, all persons who have committed no crimes and even those who are merely charged with commission of criminal offences, are entitled to the Fundamental rights and freedoms guaranteed under Chapter Four, particularly Article 12, of the Constitution. But the disabilities which the Serious Fraud Office Bill seeks to introduce in Ghana will destroy most of the fundamental human rights and freedoms of Ghanaians on mere allegations. Under Article 19(2) (c) of the Constitution, a person charged with a criminal offence is presumed to be innocent until he is proved or has pleaded guilty. Such a person cannot be saddled with liabilities except the liability to appear before a Court for the purpose of a trial to vindicate his

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innocence or establish his guilt.

And yet the officers of the Serious Fraud Office are being given powers which under the Constitution even police officers do not have. Instead of conducting investigations as responsible officers to discover suspected crimes, they are being encouraged and tempted by the Bill to employ the notoriously obsolete and reprehensible British Star Chamber procedure of the Middle Ages and the abominable Spanish Inquisition of a decadent era to bully innocent persons and extract information from them. Their victims are to be put under duress, with the threat of prosecution if they do not disclose the suspected information. This is an uncivilized and unconstitutional approach to criminal justice. It will create a culture of fear in the country; many sensible persons will be tempted to resist this inroad into personal liberty; there will be serious divisions of opinions on the necessity for this Bill; and the unity of the State will be threatened.

The implication of a Serious Fraud Office for the economy are equally devastating. For instance it will erode the development of a vibrant economy, based on the participation of private capital from both local and foreign sources. No sensible foreign business man will risk investing his money in an economy, where on an unsubstantiated accusation of "serious fraud", he stands to have his assets frozen and is denied access to his own funds. If he had had legal advice when venturing to do business in this country before this Bill surfaced in Ghana, he would have been assured that, under Article 19(11) of the Constitution of Ghana, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law. He will now search in vain in our statute book and he will not find in it any written law spelling out "serious fraud".

Clearly the lack of prescription in a written law of the crimes which are to form the subject matter of the investigation reposed in the office makes the bill unconstitutional. This is particularly so because under Clause 12 the Director may be authorized to prosecute cases where they relate to "serious or complex fraud." In the circumstance the absence of the requisite Constitutional definition of "serious or complex fraud" makes Clause 12, like Clause 9, an unconstitutional provision.

Undoubtedly the Serious Fraud Office Bill would seem to exhibit a certain immoral feature bordering on its potential to promote corrupt practices and encourage abuse of office. For instance, in the absence of any supporting evidence whatsoever, the Director acting within his own discretion and subject to no legal institutional control has power to accuse any person he chooses of "serious or complex fraud". Once this empty

accusation lacking evidence is made, he has power to proceed to deprive the person so accused of his liberty of movement and of access to his property. The purpose of the deprivation will then be given by the Director as necessary for him to search for evidence to support his premature and hollow accusation. This must surely offer considerable opportunities for abuse of power.

Another instance offered in Clause 15, is the proposed institutionalization of corruption. The Director is empowered under the bill to set up under Clause 15 an open market to apparently buy information that will be used to incriminate persons residing in Ghana. In exchange for the incriminating information, the Director can grant such reward as he may determine in consultation with a Minister designated by the President.

As is common knowledge, the majority of Ghanaians are poor. They live from month to month on their meagre salaries and wages or modest earnings from their petty trading, small-scale industries and other low income producing ventures occupations.

The temptation offered here to the poor to tell on their neighbours, by using questionable and unworthy means for the purpose of obtaining additional easy lump sum payment to supplement their low incomes is frightening. The temptation is real and at times irresistible in cases where their legitimate and hard working efforts do not yield income sufficient to meet the level of their lawful financial commitments to their households and their families. The temptation will surely corrupt the poor and unprincipled segments of the population that abound in almost all communities the world over.

The argument bandied about that informers exist in other countries and we should therefore encourage unashamedly their institutionalization and activities in this country is myopic, unfortunate and unhealthy. In most countries responsible security or police officers deal with informers in confidence and secrecy and with circumspection. The contact with informers is clandestine and it is not publicly flaunted. Under Clause 15 of the proposed legislation, the principle of informers is promoted and given statutory respectability, while its corrupt and immoral dimension is glossed over in chilly non chalance. It would appear however, that under Article 35(8) of the Constitution, the state has mandatory responsibility to eradicate corrupt practices and abuse of power instead of promoting these evils by the promulgation of this Bill into law.

It is quite clear from an appraisal and examination of the Serious Fraud Office Bill that an unconstitutional public Service designated to perform police duties and exercise police powers is what is intended to be established by the said Bill. In addition, all officers of the office are slated to be appointed in flagrant contravention of the

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Constitution. These are the central purposes of the Bill. All the provisions of the Bill without a single exception are directed and calculated to achieve these unlawful objectives. The result is that the Bill in its entirety with each of its clauses is clearly unconstitutional.

The contention of the memorandum that the UK for example, also has a "Serious Fraud Office" and so presumably we should copy it by legislation which ignores our past history and repudiates mandatory precepts of our Constitution is clearly untenable.

The argument that Zimbabwe, Zambia, Singapore and the U.K. operate a comparable system of Serious Fraud Office, is specious. This is because it has not been demonstrated that the laws which established these offices could be faulted on constitutional grounds. Take the U.K. Serious Fraud Office established in 1987 as example.

The U.K. Serious Fraud Office was constituted and established for England and Wales and Northern Ireland by the Criminal Justice Act 1987(C.38). It became operational on 6<sup>th</sup> April 1988; and under the Act it carries out its duties and functions under the professional superintendence of the Attorney General. The British, unlike us and the Americans, do not have one written document setting out the purview and delimiting the powers of its Executive and Legislative Estates. Their Parliament is therefore an institutional legislature exercising law-making powers untrammelled by constitutional restraints. But theirs is a legislature controlled by a subtle democratic culture and other non-legal conventional practices and, as a consequence, is responsive to the human right expectations of its citizens.

However, in our case since independence, almost all our leaders have exhibited a consistent psychosis of contempt for our human rights. For this reason our Constitution-makers have sought to protect us from their scandalous assaults on our rights and freedoms. Almost all the Constitutions we have had scrupulously made elaborate provisions to entrench our rights and freedoms, and insulate them from the threatening escapades of some of our leaders. The result of this our experience is that, unlike the UK Parliament, our legislature is an institution subordinate to our Constitution. All legislative Acts of our Parliament must therefore conform completely and strictly with all the provisions of our Constitution if they are to have legal validity.

The British Parliament can constitutionally curtail individual rights and freedoms by a simple legislative measure. Our legislature has no such right. If in the exercise of its purported powers it promulgates legislation which conflicts with our Constitution, that legislation is unlawful and is constitutionally void. This is a mandatory proscription in the very first Article of our Constitution where it is unambiguously stated as follows:- "The Constitution shall be the Supreme Law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall to the extent of the inconsistency be void".

As I have demonstrated herein, virtually all the provisions of the Serious Fraud Office Bill violate our Constitution and so they falter and are a nullity for the lack of constitutional propriety.

It is very important to point to a recent report by the Director of the U.K. Serious Fraud Office, covering the affairs of his office for the period 5<sup>th</sup> April 1992 to 4<sup>th</sup> April 1993, in which he demonstrated his awareness that the powers vested in his office amount to an interference with the liberty of the individual and a curtailment of his common law right to be silent when questioned by traditional legal authority. Indeed the British House of Lords in the case of Regina V Director of the Serious Fraud Office, ex-parte Smith, has recognized and conceded this interference in individual liberty inherent in the UK legislation. Lord Mustill said in his speech in that case that all civilized states recognize the assertion of personal liberty and privacy. Granted that in the nature of things there may be disagreement about where the line should be drawn, he went on to "few would dispute that some curtailment of (individual) liberty is indispensable to the stability of the state".

The U.K. legislature because it is a sovereign legislature can achieve this curtailment by an Act to that effect. Our legislature on the other hand, is subordinate to our Constitution and can only realize such curtailment within the permissible limits allowed by the Constitution.

If our Parliamentarians are set on curtailing our rights and freedoms enshrined in our Constitution and if we cannot persuade them by reasoned argument to desist, then let them set in train the relevant mechanism to either amend the Constitution or effect the curtailment within the Constitution.

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